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No. 203 October Term, 1930.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT H. LUCAS, Commissioner of Internal Revenue,
Petitioner,

vs.

WILLIAM HOBART PORTER and ANDREW W. PORTER, Executors of the Estate of William W. Porter, Deceased.

IN RE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR WILLIAM HOBART PORTER AND ANDREW W. PORTER, EXECUTORS OF THE ESTATE OF WILLIAM W. PORTER, DECEASED, Respondents.

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STATEMENT OF FACTS.

The statement of facts in the petition for the Government is somewhat incomplete, and reference is here made to the very excellent and accurate statement of the salient facts by Judge Wooley in the two opinions filed by him for the Circuit Court of Appeals in the case of Samuel F. Houston, No. 199, and in the instant case.

William W. Porter did not deduct the loss at the time of filing his return, but paid the tax under protest, and

filed a claim for refunding, which claim was allowed by letter of the Commissioner of Internal Revenue, enclosing a copy of the opinion of Nelson T. Hartson, Solicitor of Internal Revenue, dated August 21, 1923. (Record, page 11.)

Subsequently, on February 3, 1926, two and a half years later, the Commissioner revoked his ruling, and redetermined the deficiency of tax previously allowed. (Record, page 9.) Thus, as pointed out in the opinion of the Circuit Court of Appeals: "The case comes here for review on the petition of William W. Porter's executors, eight years after payment of the tax under protest, seven years after a claim for its refund had been allowed, four years after the Commissioner reversed his decision and disallowed the deduction, and two years after the taxpayer's death." (Record, pages 90-91.)

ARGUMENT.

Notwithstanding the assertions to the contrary in the Government's Brief, these respondents earnestly contend that the only questions involved in this appeal deal with the application of settled legal principles to the extraordinary and unique transactions to which respondent's decedent was a party. No conflict will be found in matters of law or statutory construction between the decision of the Circuit Court of Appeals in this case, and any of the decisions of this Court or of any Circuit Court of Appeals cited in the Government's Brief. The matters in controversy relate to the application of these undisputed principles to the peculiar facts of this case.

The transactions involving this taxpayer were without precedent, and it is safe to say will establish no precedent for future decisions. The guarantee fund, in which this taxpayer had a proportionate interest, was established in

1906, and was liquidated in 1921. It had neither market value nor means of determining market value. The only available evidence of value on March 1, 1913, was supplied by the testimony of Samuel F. Houston, then Vice President and now President of the Trust Company which was the administrator of the subject matters concerned. Mr. Houston stated that as late as 1916, he was of opinion that the Trust Company "would work out from the Segal assets a sum sufficient to return to their subscribers the amount of their contributions." (Record, page 79.) This evidence is ignored and stands uncontradicted by the Government. Yet it satisfies the rule enunciated by this court in Reinecke vs. Spalding, 280 U. S. 227, that "Under the statute it became necessary for respondent to establish the fair market value of her interest in the mines on March 1, 1913, or at least that such value was not below what she claimed it was."

The same cases cited in the Government's Brief were forcibly pressed upon the consideration of the Circuit Court of Appeals by counsel for the Government, and their authority was not disputed. This is clearly stated in the opinion of that court, which said:

> "The petitioner does not question the law of those cases which is in effect that a loss in an ordinary transaction relating to property owned outright by the taxpayer and entered into before March 1, 1913, is determined by adopting either the value as of that date or the cost at the earlier date, whichever is lower, as a basis, but he maintains that all those cases deal with property having a readily ascertainable value such as real estate, instruments evidencing debt and the like, which is different from ascertaining a loss under a right of the character here involved where the result of the venture could not be known until the Segal matters had been liquidated and where, therefore, the loss

of a guarantor, or the value of his correlative right to reimbursement, is not ascertainable until the guaranty transaction is liquidated and where, until then, no ascertainable loss had occurred."

(See Record, page 99, LUCAS vs. HOUSTON, No. 199.)

Under the facts peculiar to this case, the original ruling of the Commissioner, which held that the loss admittedly suffered was properly deductible, was sustained by the subsequent ruling of the Circuit Court of Appeals. This ruling is not at variance with any principles or statutory constructions to be found in any decisions of this Court. Its result was just and equitable. A further review by this Court would serve no useful purpose, but would further delay the settlement of the estate of this deceased taxpayer.

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